88-135

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DeSIMONE and HELEN DeSIMONE,
his wife,

Petitioners,

vs.

RICHARD L. BOVE, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a diversity tort case, when an appeal is pending from a federal district court judgment on a jury verdict, and then a new state appellate court decision decides controlling issues of state law which determine the outcome of the appeal, must the federal appellate court follow such new decision under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938)?

The Court's attention is also directed to a similar issue that is presently pending before this Court in No. 87-1467, *Exxon v. Banque de Paris et des Pays-Bas*, on writ of certiorari to the Court of Appeals for the Fifth Circuit. *See* __ U.S. __, 108 S.Ct. 1572 (1988).

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PETITION FOR WRIT OF CERTIORARI

John and Helen DeSimone ("DeSimone"), hereby petition for a writ of certiorari and ask this Court to vacate the judgment below and remand the case for reconsideration in the light of the intervening decision on the controlling issues of Pennsylvania law in *Sagala v. Tavares*, 533 A.2d 165 (Pa. Super. 1987).

OPINION BELOW

The opinion of the court of appeals (App. A) is not officially reported. There was no opinion of the district court.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on March 29, 1988. A timely petition for rehearing was denied on April 21, 1988 (App. C). This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

> The laws of the several states, except where the Constitution of treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT

John DeSimone went to Dr. Bove who told him he needed a colon examination because he had had cancer surgery a year before. The colon-rectal surgeon told DeSimone that he needed a total colonoscopy exam, and DeSimone said he didn't want it. The doctor said that he had to do it and DeSimone believed him. Because he trusted what the doctor told him, DeSimone underwent the procedure. The doctor did not tell DeSimone the whole truth — DeSimone had suffered from a condition which increased his risk of perforation of the colon — he had diverticulosis. Dr. Bove did not tell him that he suffered from this nor did he tell him that this condition increased the risk of perforation of the colon from a colonoscopy procedure.

Dr. Bove did not perform barium enemas, which are an alternative method/form of diagnostic colon examination.

Dr. Bove did not tell Mr. DeSimone that a barium enema was another way to take a look at the inside of his colon, and that the barium enema was a much safer examination procedure because it did not require insertion of long flexible scope into the colon. The diverticulosis condition would not then constitute an increased risk, in addition to not hazarding the inherent risk of perforation occurring when a foreign instrument is placed deep inside the body.

DeSimone's colon was perforated during the colonoscopy procedure, at the site of a diverticulum. The risk not disclosed actually happened.

The DeSimone's, residents of Los Angeles, California, brought the instant action in September, 1986, against Bove, a Philadelphia, Pennsylvania resident. The district court action, brought in diversity jurisdiction under 28 U.S.C. § 1332, sought damages based on Bove's lack of informed consent, breach of fiduciary disclosure, and medical malpractice.[1] Bove answered, denying any breach of duty of disclosure, and claiming that the risk of perforation is an inherent risk of a colonoscopic procedure, that DeSimone's consent was fully informed, and that Bove's actions all comported with the standards of specialists in his field.

At trial, the evidence was undisputed that diverticulosis is a condition that increases the risk of harm of perforation of the colon. The use of the barium enema as an alternative examination method was disputed. Specialists in colon-rectal surgery consider colonoscopies as the "gold standard" and the "procedure of choice." Internists opine that barium enemas are a useful and safer form of examinations of the colon. The two examinations may even complement one another.

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[1] Mrs. DeSimone's claim for loss of consortium, is derivative to her husband's claims; therefore all references to DeSimone herein refer to Mr. DeSimone's primary claims.

DeSimone testified that he remembered Bove had told him in May of 1984 that a total colonoscopy carried with it a risk of perforation. Although it was not disputed that DeSimone was not informed of the increased risk of perforation due to his diverticulosis, the district court granted Bove's motion for a directed verdict on this issue (App. A - 3, App. E - 2). The colloquy between counsel and the court regarding the directed verdict is shown at App. E - 1-2).

The district court, and the court of appeals concluded the increased risk of perforation due to diverticulosis was simply a "medical detail" which need not have been disclosed to DeSimone. The court of appeals went further (App. A - 4) holding that DeSimone needed expert testimony to prove his particular diverticulosis increased his risk.

With regard to DeSimone's not having been informed of the existence of a barium enema, the district court instructed the jury that Bove, a specialist in colon-rectal surgery, only had to disclose to DeSimone such information as other specialists in his field would have disclosed (App. E - 2). The court's "specialist standard" instruction regarding Bove's duty to disclose was repeated numerous times (App. E - 3-5). After deliberating, the jury inquired of the district court about the proper standard to which Bove was required to conform (App. E - 4), particularly about the standard of disclosure of a specialist (App. E - 5). The district court confirmed its prior statements that Bove, a specialist in colon-rectal surgery, only had to tell DeSimone whatever another colon-rectal specialist would have deemed proper. (App. E - 5).

The jury returned a verdict in favor of the defendant Bove very shortly after the district court's reaffirmance of the specialist standard.

Counsel for DeSimone objected to the "specialist standard" nature of the instructions, but the district court

declined to change its mind, believing that a "reasonable man" standard cured any such defect. (App. E - 4).

DeSimone timely appealed, and on March 29, 1988, a panel of the court of appeals affirmed the district court in an unpublished opinion (App. A - 1-8). All parties agreed that Pennsylvania law applied. The court of appeals ruled that DeSimone's "general knowledge" of the risk of perforation from a total colonoscopy constituted sufficient disclosure of material information, and that it is not material for a patient to understand the "medical detail" leading to the particular risk. (App. A - 4). But, if DeSimone had presented expert testimony that his particular diverticulosis made his risk materially greater, then such nondisclosure would have precluded the grant of the directed verdict. (App. A - 4).

With regard to the "specialist standard" instructions concerning the disclosure of the barium enema, there was no dispute that Bove did not inform DeSimone of it. The court of appeals held that the initial charge and supplemental instructions properly stated Pennsylvania law on informed consent (App. A - 5). The appellate court found ". . . that the specialist standard discussed by the court clearly related to the testimony required to establish the existence of alternative treatments and not to what a reasonable patient would consider important." (App. A - 7). The instructions were upheld as proper statements of Pennsylvania law on informed consent.

The court of appeals denied a timely petition for rehearing on April 21, 1988. (App. B).

After the trial court judgment, based on the jury's verdict for Dr. Bove, was entered on September 16, 1987 (App. D), the Pennsylvania intermediate appellate court — the Superior Court — decided an informed consent case involving the same issues involved here: *Sagala v. Tavares*, 533 A.2d 165 (Pa. Super. 1987). *Sagala* held that expert testimony concerning professional standards of disclosure and conformance with customary practices

of other physicians improperly usurps a jury's role as the trier of fact of the materiality of a risk. Professional customs testimony is incompatible with the Pennsylvania reasonable patient standard. *Id.* at 168.

Sagala further held that patients have the absolute right to be informed of all material facts concerning medical attention, whether the consent to such attention is rational or not. *Ibid.* Moreover, a reasonable man standard — based on negligence principles — erroneously diverts a jury's attention to the standard of care of medical practitioners, which Pennsylvania has rejected. In Pennsylvania, a negligence based reasonable man instruction in an informed consent case is legally improper. *Id.* at 169. *Sagala* thus reversed a jury verdict for a defendant physician who had failed to warn a patient contemplating foot surgery of the risk of a pulmonary embolism. After surgery, such embolism occurred, and the patient died.

The Pennsylvania appellate court held that expert testimony of the physicians that such a risk of pulmonary embolism was so remote that they would not have warned the patient of it was erroneously admitted, as usurping the trier of fact rule. Only the jury could determine whether or not an omitted fact was or was not material.

Since *Sagala* was decided two months after the district court's judgment, its publication came only in time for citation to the court of appeals in DeSimone's reply brief. *Sagala* is not mentioned in the opinion (App. A).

Nor is *Sagala* referred to in the denial of rehearing (App. C), although it was strenuously argued to the appellate court.

REASONS FOR GRANTING THE WRIT

This Court exercises supervisory powers over the federal courts of appeal. Under Rule 17.1(a) of this Court, a reason for granting the Petition herein is that a federal court of appeals has ". . . so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power and supervision." The court of appeals here has ignored the Court's decision in *Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941), which is directly in point. Vandenbark* was a diversity case, where this Court ruled that the doctrine of *Schooner Peggy*[2] was incorporated in the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). "A Federal Court sitting in a diversity case must therefore apply the most recent state court decision, even if it came after the operative events or the entry of judgment by a lower court." *Linkletter v. Walker*, 381 U.S. 618, 626 (1965), fn.10.

Here, the application of *Vandenbark* required the court of appeals to follow *Sagala* with the following results:

A. The directed verdict could not stand, because the "medical detail" about which DeSimone was uninformed, constituted the very facts and risks which the jury alone could have determined were material to DeSimone. "The primary focus of Pennsylvania law with respect to informed consent is to guaranty that a patient is supplied with *all* the material facts . . ." (Emphasis added.) 533 A.2d at 168. *Sagala* does not state that DeSimone need only be informed of such facts that a judge deems material.

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2 *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

B. The appellate court's holding that had DeSimone introduced expert testimony about his degree of susceptibility (App. A - 4) was precluded by *Sagala's* holding that expert testimony cannot be offered to prove the materiality of a risk. *Sagala* did not even require the injured patient to prove that he would not have consented to the procedure, because the focus of the tort of lack of informed consent is on the lack of the doctor's telling the patient the whole truth. *Sagala* bars the introduction of principles incompatible with the reasonable patient standard in Pennsylvania, *Id.* at 168. Thus the court of appeal's opinion increased DeSimone's burden of proof beyond what *Sagala* requires. *Ibid.*

The court of appeals would focus on the severity of the patient's condition, and only if it were serious, would a physician have to make a disclosure. Because this leaves a doctor with the ultimate decision as to when to disclose facts and risks to patients, the court of appeals applies the professional customs standard instead of the Pennsylvania prudent patient one. The jury was the sole arbiter of whether or not Bove's conduct increased the risk of harm which, in fact, DeSimone, sustained, and whether or not Bove's non-disclosure was a substantial factor in producing DeSimone's harm. *Cf. Jones v. Montefiori Hospital*, 431 A.2d 920 (Pa. 1981), at 924.

C. The court of appeals ignored *Sagala*'s mandate that expert testimony about medical custom of disclosure violated the

Pennsylvania reasonable patient standard. Because such testimony usurps the jury's function, whether or not Bove — or any specialist — or any doctor — would have informed DeSimone of the existence of the barium enema, is irrelevant.

D. The court of appeals designation of the "specialist standard" as applicable only to the existence of "alternative treatments" (App. A - 7) is similarly precluded by *Sagala*. Evidence of the customary practices of other physicians is improper as a test for whether or not disclosures were sufficient to enable a patient to make an informed consent. *Sagala* deals with disclosures of risks of harm. However, *Sagala* relies on *Jozsa v. Hottenstein*, 528 A.2d 606 (Pa. Super. 1987). *Jozsa* holds that once expert medical testimony establishes that there was an alternative form of treatment, and that the patient was not informed of same, and after the patient suffers injury from the procedure which the physician does perform without having disclosed the alternative procedure, only the jury may decide whether the omission of disclosure of the alternative treatment was material to an informed consent. *Ibid.* at 608.

Sagala makes it clear that Pennsylvania does not allow expert medical testimony to prove anything other than the existence of risks or alternatives. Physician's opinions about the significance or insignificance of same usurps the jury's function. Whether or not an examination procedure is viable is the same question as whether or not a risk is material: only the jury may answer it.

The court of appeals' reference to the standard of care regarding ". . . alternatives accepted by specialists in that field . . ." (App. A - 7) violates *Sagala*'s preclusion of evidence of prevailing medical standards in advising patients. Whether or not colon-rectal specialists "accept" a procedure has no relevance to whether or not a patient has a right to know of its existence.

Disclosure of the barium enema as an alternative examination procedure is just a method of describing the risks inherent in the total colonoscopy examination. The barium enema is an alternative because its possible consequences are different. Thus alternative procedures concern different risks since patients needing examinations can be examined in different ways.

The court of appeals should have determined that the District Court's use of the specialists standard improperly increased DeSimone's burden of proof, which *Sagala* forbids.

Expert medical testimony of DeSimone's diverticulosis condition focuses on negligence principles because same would only show what Bove knew or should have known about its seriousness. *Sagala* bars such negligence principles because informed consent cases focus on the non-disclosure of information; not Bove's standard of care in examining and knowing his patient's condition. The perforation is a result of the non-disclosure, not of the misdiagnosis of DeSimone's disease of diverticulosis.

With regard to the position the use of the reasonable man standard moderated DeSimone's objection to the use of the specialist standard (App. E - 4), which the court of appeals ignored, *Sagala* specifically states that the use of a reasonable man standard applied to a physician's duty to inform is improper. *Id.* at 169. Such statements "erroneously diverted the jury's attention as to whether the defendant-physician conformed to the standard of disclosure of the reasonable practitioner in his community." *Ibid.*

Sagala fits under the *Vandenbark* rationale because it clarifies Pennsylvania law — *Sagala* establishes the plaintiff's burden of proof in an informed consent case. It precludes the use of expert medical witnesses who testify about the customary standard of disclosure in informed consent cases. It further changes Pennsylvania law by precluding the reasonable man references to gauge the acts or omissions of a physician in an informed consent case. Finally, it does not require a patient to only act rationally in choosing a course of medical attention.

To the extent *Sagala* simply clarified Pennsylvania law, it still must have been applied as the most recent determinative statement of Pennsylvania law binding a federal appeals court in a diversity case. *Oklahoma Packing Co. v. Oklahoma Gas Co.*, 309 U.S. 4, 7, 8 (1940).

To the same effect is *Huddleston v. Dwyer*, 322 U.S. 232 (1944), applicable when courts of appeals have already rendered a decision when the new state law decision is made. Because such matter is still *sub judice*, rehearings are required so that the most current state law is applied by the federal court. This is the issue already granted certiorari in *Exxon*, as noted hereinabove.

This Court's decisions in *Vandenbark*, *Oklahoma Packing* and *Huddleston*, logically flow from this Court's landmark decision in *Erie, supra*,

> "... the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

Walker v. Armco Steel Corp., 446 U.S. 740, 745 (1980). *Cf. Stewart Organization, Inc. v. Ricoh Corporation*, ___ U.S. ___, 56 L.W. 4659, 4663 (1988) (Scalia, J.,

dissenting). "(Rules of Decision Act 'simply requires application of state law unless Federal Law applies'.)"

No federal rules are involved here, and thus no federal policy is served by the court of appeals failure to follow current Pennsylvania law. To the contrary, federal judicial policy established by this Court is harmed by the court of appeals failure to follow the most recent statement of Pennsylvania law. *Walker* holds the federal court may not add something to a state cause of action. 446 U.S. at 746. It goes on to state that the *Erie* doctrine had two aims, discouragement of form-shopping and avoidance of inequitable administration of the laws. *Id.*, at 747. Unless the court of appeals here seeks to discourage diversity plaintiffs, forum-shopping is not involved.

But *Erie's* second aim — equitable administration of the laws — is deeply involved. No federal policies here are served by the court of appeals refusal to follow state law. Thus, as in *Walker*, a result constituting "inequitable administration" of the law constitutes grounds for reversal. Policies which underlie diversity jurisdiction preclude distinctions, as here, between state and federal plaintiffs. Moreover, this Court's continuous line of decisions since *Erie* do not permit it. *Walker, supra*, 446 U.S. at 753.

It should be noted that this Court has consistently held that federal courts are bound by decisions of a state's intermediate appellate courts, absent persuasive evidence that the state's Supreme Court would rule otherwise. *See King v. Order of United Commercial Travelers*, 333 U.S. 153, 158, (1948) and cases cited therein. And, it is equally clear that this Court considers issues concerning a plaintiff's required elements to prove his state cause of action to be a matter of substance, not procedure, requiring state law to be applied. *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939), citing *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512 (1915). *Cf.*

Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942).

This Court has also held that state law must be followed by a federal court, in diversity, concerning the state rules defining the evidence sufficient to raise a jury question as to whether or not a state-created right had been established. Thus, a state rule that the answer to certain questions must be decided by a jury, and the evidentiary burdens on a plaintiff to have his case go to a jury are matters of substance, and a federal court must adhere to and follow same. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 468 (1940). *See Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958), fn.15. Federal courts must be alert to changes in state law, because federal courts sitting in diversity are ". . . in effect, only another court of the state." *King v. Order of United Commercial Travelers, supra*, 333 U.S. at 161, and the court of appeals here should have considered the *Sagala* decision, *Id.* at 157, fn.11.

The court of appeals either misinterpreted this Court's *Vandenbark* and *Huddleston* and *Oklahoma Packing Co.* decisions, or unilaterally determined that the passage of more than forty years had weakened their controlling force. As this Court ruled in *Day and Zimmerman v. Challoner*, 423 U.S. 3 (1975) when a court of appeals refuses to follow this Court's prior precedents, the judgment should be vacated and the case remanded.

Blaauw v. Grand Trunk Western R. Co., 380 U.S. 127 (1965) is particularly instructive. The court of appeals for the Seventh Circuit had affirmed a jury verdict (brought in diversity) for defendant railroad, holding that the injured minor plaintiff could not sue for violation of an ordinance the court of appeals determined was invalid. Plaintiff's petition for rehearing was denied one month later. However, within three months thereafter, an Illinois appellate court examined the effect of the Chicago Safety

Ordinance, clarified Illinois law, and upheld the validity of another minor plaintiff's injury suit against a railroad for a similar violation of the safety ordinance. *See American National Bank and Trust Co. v. Pennsylvania R. Co.*, 202 N.E.2d 79 (1964). Since *Blaauw* was still *sub judice*, this Court granted Blaauw's Petition for Writ of Certiorari and vacated the appellate court judgment, remanding the case back to the court of appeals for reconsideration of the new state appellate court decision. Because the situation here is the same, the remedy in *Blaauw* for petitioners is apposite. *Cf. Linkletter v. Walker, supra*, 381 U.S. at 626-627, fn.10. The result of the foregoing shows that the court of appeals simply ignored Pennsylvania law when it affirmed the district court.[3]

DeSimone should not be penalized because he properly chose to bring his action in federal court, in diversity, in contrast to Mrs. Sagala, a Pennsylvania resident, who brought suit in state court.

Because the courts below applied incorrect legal standards, this Court does not consider whether or not the ultimate result would be the same had the correct standard been applied; remand is appropriate. *Malat v. Riddell*, 383 U.S. 569, 572 (1966). (trial court ruling that Plaintiff had not sustained burden of proof, where trial court's legal standard was incorrect.)

Similarly, when a jury instruction is legally in error, this Court will not speculate on what verdict would have

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[3] The court of appeals also ignored paragraph C of Chapter 8 of its own Internal Operating Procedures which states that one panel may not overrule a published opinion of a previous panel; only a decision by the full Court may do so. *Marino v. Bailestas*, 749 F.2d 162 (3d Cir. 1984), holds that information about differing schools of medical thought is required to be disclosed to patients. *Id.* at 168. Petitioners also relied on *Marino*, but it, like *Sagala*, is not even mentioned in the court of appeal's opinion.

been returned with the proper instruction. Remand for a new trial is appropriate in such circumstances, because a reviewing court which makes such assumptions usurps the functions of the jury. *Milanovich v. United States*, 365 U.S. 551, 555-556 (1961).

CONCLUSION

This case is important. To the parties, it represents tremendous personal, economic and moral battles. But in this Court, it represents the frustration of parties and counsel from different parts of our vast country with the difficulty of application of the adage that we are a nation of laws, not men. This Court has always been sensitive to considerations of *stare decisis*, as a principle of policy. *Patterson v. McLean Credit Union*, ___ U.S. ___, 108 S.Ct. 1419, 1421 (1988). However, this Court, as the final arbiter of the rule of law in the United States, abided by its own rules and precedents for changing the rules. This, of course, is a fundamental purpose of the doctrine of *stare decisis* — societal conduct should not be judged by hindsight. This Court expends tremendous energy and resources in formulating rules for the conduct of American society, which are passed down to and implemented by all lower courts. Malfunctions in any particular circuit destroys the effectiveness of the whole system.

This case is important because it is really about the *truth*. As between the parties, doctors should tell patients the whole truth. As regards the judicial system in this country, truth is its lynchpin. So, too, is the obligation of courts to adhere to the truth. Truthful decisions engender trust in the system, without which *stare decisis* would wither. And so, the system is predicated upon everyone following, respecting and trusting the same rules. A result of such adherence is this Court's comment in *Patterson* that ". . . the claim of any litigant for the application of a rule to its case should not be influenced by the

Court's view of the worthiness of the litigant in terms of extralegal criteria." *Ibid.*

DeSimone was injured when Bove did not tell him the whole truth. DeSimone was injured again when the jury did not hear the whole truth. The district court took away part of the case, and misinformed the jury on the balance. DeSimone was further injured when the court of appeals ignored the true law of Pennsylvania. DeSimone is entitled to redress.

Petitioners submit the court of appeal's refusal to honor this Court's precedents constitutes a far departure from the accepted and normal course of judicial proceedings. The court of appeal's affirmance of the district court sanctions such same departure by the district court. Only this Court can exercise supervision over such lower tribunals, and petitioners are entitled to the issuance of the Writ herein.

Dated: July 20, 1988

Respectfully submitted,

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John and Helen DeSimone

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1616

DeSIMONE, JOHN, and DeSIMONE, HELEN, his wife

vs.

BOVE, RICHARD L., M.D.
METHODIST HOSPITAL, a/k/a
METHODIST HOSPITAL FOUNDATION

JOHN DeSIMONE and HELEN DeSIMONE,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-5529)
District Judge: Honorable Louis C. Bechtle

Submitted Under Third Circuit Rule 12(6)
March 15, 1988
Before: STAPLETON, MANSMANN, and HUNTER,
Circuit Judges.

(Filed MAR 29, 1988)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this informed consent/medical malpractice case, the appellant-patient asserts that the district court erred in directing a verdict for the defendant-doctor on the issue of whether the doctor had properly informed the patient of material information concerning the risk of a medical procedure. The appellant also contends that the district court erroneously instructed the jury on the standard of informed consent which a physician is bound to disclose to a patient. For the reasons stated below, we will affirm.

I.

John and Helen DeSimone[1] brought a medical malpractice action against Richard L. Bove, M.D., claiming that Dr. Bove had negligently performed a colonoscopy on Mr. DeSimone and had failed to obtain DeSimone's informed consent to the procedure.

The allegation of negligence was based on a perforation of the colon which occurred during the procedure. The theory of DeSimone's informed consent allegation was that Dr. Bove failed to inform him of the increased risk of colon perforation in a patient with diverticulosis during a colonoscopy and second, that Dr. Bove failed to inform DeSimone of the existence of an alternative procedure (a barium enema).

The jury found the Dr. Bove did not negligently perform the colonoscopy. In regard to the increased risk

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[1] Since Helen DeSimone's claim is derivative of her husband's claim, it will not be dealt with separately.

aspect, the district court directed a verdict for Dr. Bove. The issue of informed consent on the alternative procedure theory went to the jury, which found for the defendant.

DeSimone timely appealed and asserts that the district court improperly directed the verdict and erroneously instructed the jury on the standard of disclosure for informed consent.

II.

Our standard of review on appeal from the grant of a directed verdict is plenary. *Indian Coffee Corporation v. Proctor & Gamble*, 752 F.2d 891 (3d Cir. 1985), *cert. denied, sub nom Folger Coffee Company v. Indian Coffee Corporation*, 474 U.S. 863 (1985).

We review jury instructions to determine whether, when viewed as a whole, the issues were fairly and adequately presented to the jury. *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985).

III.

Mr. DeSimone asserts that the court erred in directing a verdict for the defendant on the issue of disclosure of the risk of perforation of the colon during a colonoscopic examination. Under Pennsylvania law, the physician is bound to disclose all the material risks involved in any recommended treatment. The jury must decide whether any non-disclosed risks were material. *See Festa v. Greenberg*, 354 Pa. Super. 346, 511 A.2d 1371 (1986).

In this case the appellant himself stated that he recalled Dr. Bove informing him that colonoscopy carried with it a risk of perforation, and that he was aware of and understood the risk at the time of the procedure at issue.

Under these circumstances we find that the court properly directed a verdict for Dr. Bove on this issue. Pennsylvania law requires the disclosure of the risks which may result from a procedure and the probability of its occurrence. *Festa*, 511 A.2d 1371. The court directed this verdict based on its perception that a patient must understand the risk involved in a procedure, whether or not he was aware of all the medical detail that led to that risk. Here, Mr. DeSimone admitted that he understood the risk of perforation inherent in the procedure. While Mr. DeSimone might arguably have been entitled to reach the jury on this claim if the evidence showed that his diverticulosis was such that the risk of perforation for him was materially greater than the risk of which he was apprised, no expert familiar with his condition testified that it rendered him materially more susceptible to perforation. We therefore find that the court's grant of a directed verdict should be affirmed.

DeSimone next asserts that the district court erred in its instruction to the jury on the issue of informed consent relative to alternative treatment. It is undisputed in this case that Dr. Bove did not inform DeSimone that a procedure known as a barium enema might be performed in lieu of colonoscopy. DeSimone contends that the court's instruction was improper in that it did not focus on what the reasonable patient would consider important in making an informed decision about treatment.

The law in Pennsylvania on informed consent is clear. Pennsylvania courts have adopted the "prudent patient" standard of informed consent under which valid informed consent is not dependent upon the standards of the medical community. A patient's consent to medical treatment is valid if:

> . . . the physician disclosed all those facts, risks and alternatives that a reasonable man in the situation which the physician knew or should have known to be the plaintiff's would deem

> significant in making a decision to undergo the recommended treatment. The physician is bound to disclose only those risks which a reasonable man would consider material to his decision whether or not to undergo treatment.

Cooper v. Roberts, 220 Pa. Super. 260, 267-68, 286 A.2d 647 (1971). *See also Neal by Neal v. Lu*, ___ Pa. Super ___, 530 A.2d 103 (1987); *Jozsa v. Hottenstein*, ___ Pa. Super ___, 528 A.2d 606 (1987); *Festa v. Greenberg*, 354 Pa. Super. 346, 511 A.2d 1371 (1986).

Our review of the record indicates that both the initial charge and the supplemental instruction to the jury were correct in their statement of the applicable law, and did not state the law in a confusing or misleading way. In its initial charge the court stated:

> [He] must inform the patient of the nature of the proposed procedures and treatment and the risks involved to the extent that a reasonable patient in plaintiff's position would have considered certain risks important.
>
> He must also inform him of other methods of treatment that the doctor believes that the patient in his position would have considered important in making a decision.
>
> . . . .
>
> Let's read it again with that instruction in mind. On October 18, 1985, in order for John DeSimone to make an intelligent choice was it necessary for him to have been informed that a barium enema was an alternative to a full colonoscopy?
>
> The question part is was he informed, is that something that a patient would have considered necessary to be informed or if the patient was to make an intelligent choice?

> You have heard experts differ on whether or not that is really something that would make the patient make an intelligent choice. It is only an intelligent choice if the alternative method has some meaning or would work or if the specialist in the community thinks it is really an alternative to what is to be done.

During its deliberation, the jury requested reinstruction on informed consent. The court responded in the following manner:

> [Informed consent] means that the physician is bound to disclose to the patient all those facts which a reasonable man, in the situation in which the doctor knew or should have known to be his patient's situation, would consider it important to the patient's decision whether to undergo treatment.
>
> This standard requires the doctor to inform the patient of the nature of the proposed procedure or treatment, the risks involved, other methods of treatment that are available for what is to be done, inherent dangers, possibilities of its success, alternative methods to do what has to be done.
>
> . . . .
>
> You have to determine — you, the jury, should determine whether or not a reasonable person in Mr. DeSimone's position would have considered [the barium enema] to be important in making a decision.
>
> It is going to depend on the extent to which you believe that alternative was necessary for an intelligent choice to be made by Mr. DeSimone.

We find that the charge and reinstruction clearly and properly set forth Pennsylvania law on informed consent. The appellant suggests, however, that the charge was

confusing because the court also stated a "specialist standard" and thus the jury might have been misled.

The law in Pennsylvania is also clear that expert medical testimony is necessary to establish the existence and magnitude of the risks of a recommended medical procedure, as well as viable alternatives. *Jozsa v. Hottenstein*, ___ Pa. Super. ___, 528 A.2d 606 (1987).

Our review indicates that the court took great care to twice remind the jury that expert witnesses had disagreed as to whether the alternative procedure, the barium enema, was a viable alternative to the colonoscopy. Specifically, the court told the jury:

> [I]f you believe that at that time this was an alternative accepted by specialists in that field and the plaintiff should have known it in order to make an intelligent choice, the plaintiff was entitled to have that before he consented, and the consent without that would not be consent.

Later, the court instructed that:

> Going back to 1985 and stepping into Dr. Bove's shoes, do you believe that he conformed to the skill of persons practicing in this specialty, in the manner in which he informed the plaintiff as to what was to happen, and specifically did he conform by not advising him that a barium enema was a real alternative?
>
> You have to determine — you, the jury, should determine whether or not a reasonable person in Mr. DeSimone's position would have considered [the barium enema] to be important in making a decision.

We find that the specialist standard discussed by the court clearly related to the testimony required to establish the existence of alternative treatments and not to what a reasonable patient would consider important. Accordingly, we find that the jury charge properly and fully

conformed to the law of Pennsylvania on informed consent.

IV.

Therefore, for the reasons stated above, we will affirm the entry of judgment.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1616

DeSIMONE, JOHN, and DeSIMONE, HELEN, his wife

vs.

BOVE, RICHARD L., M.D.
METHODIST HOSPITAL, a/k/a
METHODIST HOSPITAL FOUNDATION

JOHN DeSIMONE and HELEN DeSIMONE,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-5529)
District Judge: Honorable Louis C. Bechtle

Before: STAPLETON, MANSMANN, and HUNTER,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States Eastern District Court for the District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on March 15, 1988.

On consideration whereof, it is now there ordered and adjudged by this Court that the judgment of the District

court entered on September 16, 1987 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:
/s/ Sally Mrvos
Clerk

Costs taxed in favor of the appellee as follows:

Brief $185.02

Certified as a true copy and issued in lieu of a formal mandate on April 29, 1988

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

MAR 29, 1988

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1616

John DeSimone and Helen DeSimone, his wife,

Appellants

vs.

Richard L. Bove, M.D.

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTTOM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER, Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

April 21, 1988

APPENDIX D

498A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

FILED SEP 16, 1987

JOHN & HELEN DeSIMONE, h/w
vs
RICHARD L. BOVE, M.D.

CIVIL ACTION

NO. 86-5529

CIVIL JUDGMENT

Before Louis C. Bechtle

AND NOW, this 15th day of September 1987, in accordance with jury's answers to interrogatories

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant, RICHARD L. BOVE, M.D. and against the plaintiffs, JOHN and HELEN DeSIMONE.

BY THE COURT:

/s/ Lisa Costanzo
ATTEST: Lisa Costanzo
Deputy Clerk

ENTERED: 9-16-87

CLERK OF COURT

Civ 1 (8/80)

APPENDIX E

EXCERPTS FROM PAGES OF APPELLATE RECORD

Page 314a, ll. 4-25 through p. 315a and 316a, ll. 1-4 and ll. 13-16:

I'm concerned about the informed consent. Why don't you tell my why that should go to the jury.

MR. BOLDEN: On the very minimum, that he did not inform the plaintiff of the risks of diverticulosis as an increased hazard in the performance of it and he did not explain to him the alternative of barium enema as a procedure for making the same diagnostic evaluations that could be made with the use of a colonoscope.

THE COURT: All right. I understand the barium enema. Dr. Fox was strong on that. It will be a jury question on that.

Tell me about the other.

MR. BOLDEN: The other is the diverticulosis. That is an increased risk or hazard of a procedure, and it increases the possibility of perforation beyond that which would exist in the absence of it, and I believe Dr. Fox testified to that.

THE COURT: What do you remember his testimony to be on that point?

MR. BOLDEN: My remembrance is that he explained what a diverticulosis was, that these were outpockets or weakenings of the wall of the colon, and that the existence of diverticulosis increased the hazard of perforation, and that in fact in this case the perforation occurred at that precise spot, that it was at a point of a diverticulum.

THE COURT: Your position is that that occurred before there was any improper procedure used, not because of the condition of the plaintiff —

MR. BOLDEN: It is my position of the improper procedure used, but that in addition to the fact that it

occurred, it is an increased hazard or risk of the procedure that the patient is entitled to be informed of.

THE COURT: But the risk is that it could result in the perforation?

MR. BOLDEN: Yes, Your Honor.

THE COURT: And that could more likely occur because of that?

MR. BOLDEN: Yes, it could occur more likely and the patient is entitled to be informed of that.

THE COURT: But didn't your client say he understood and he was told in May of 1984 and remembered being told that in November of 1985, that a full colonoscopy could result in a perforation?

MR. BOLDEN: Yes, Your Honor, that is true. But he was not told that the hazard of perforation, which he understood to be a hazard of the procedure, was a hazard which increased with the existence of the condition which he was found to have: diverticulosis.

THE COURT: Well, I think he knew it. The risk is a perforation, for whatever reason.

* * *

I think he was informed of that. He may not have been informed of all the medical detail but he knew all the medical detail led up to the risk, which was a perforation. So I think he stated that himself.

Page 457a, ll. 15-25 and p. 458a, ll. 1-12

You have to decide: On October 18th, did Dr. Bove inform the plaintiff of what was to happen, the risks and any alternative means that would have been furnished by other specialists in that field? Because, the standard here for a specialist is to follow that course of conduct that other specialists in the field at that time would follow,

and to perform as a reasonable person would perform at that time under all the circumstances.

If you believe Dr. Bove, in not including in his discussion with the plaintiff the fact of the availability of a barium enema as an alternative, if you believe he was following what the specialists skilled in his field would have done at that time, and if you also believe that he acted as a reasonable person, Dr. Bove, at that time, a reasonably prudent person would have done, then even though he didn't inform the plaintiff, he cannot be liable because he wasn't required to inform the patient.

But, if you believe that the specialists in Dr. Bove's field at that time would have informed Mr. DeSimone that this alternative service was available, and if you believe that a reasonable doctor at that time would have done so and Dr. Bove didn't, then he failed to inform sufficiently to make the plaintiff's consent a valid consent.

Page 459a, ll. 15-20 and ll. 25 through p. 460a, ll. 4.

You have heard experts differ on whether or not that is really something that would make the patient make an intelligent choice. It is only an intelligent choice if the alternative method has some meaning or would work or if the specialist in the community thinks it is really an alternative to what is to be done.

* * *

But if you believe that at that time this was an alternative accepted by specialists in that field and the plaintiff should have known it in order to make an intelligent choice, the plaintiff was entitled to have that before he consented, and the consent without that would not be consent.

Page 477a, ll. 4-20

THE COURT: Mr. Bolden?

MR. BOLDEN: Your Honor, in instructing the jury on the issue of the standard of care in an informed consent case, your Honor on two occasions alluded to the kind of information that a specialist in the field would give to someone about the procedure. I think that requires a higher burden than what the plaintiff is required to show. I think it should be the kind of information that a physician performing the procedure would impart. Because, if there is evidence that would suggest one diagnostic field might perform it one way and another field would perform it another way, and a third field would do it a third way, to require only a specialist in the specific field supplying the information —

THE COURT: Well, I think that is covered by the second element, that he must also perform as a reasonable person. So I won't change that.

Page 489a, ll. 17-22

Going back to 1985 and stepping into Dr. Bove's shoes, do you believe that he conformed to the skill of persons practicing in this specialty, in the manner in which he informed the plaintiff as to what was to happen, and specifically did he conform by not advising him that a barium enema was a real alternative?
Page 490a, ll. 13-25 and p. 491a, ll. 1-18

JUROR NO. 8: In your charge we seem to have understood you said that the general quality of care in the community in which the doctor operated was also to be taken into consideration as far as —

THE COURT: Okay. What I said was this. I said that in judging the doctor's conduct, if you will, in not including reference to the alternative, this alternative of a barium enema, you have to determine whether that doctor conformed to the standard of care generally recognized by other physicians in the same specialty confronted with that same circumstance at that time that was confronted by Dr. Bove. If he conformed to that standard, then he is not responsible even though there might be a school of thought or a person or two who might think differently.

If what he did satisfied what the practitioners, the reasonable practitioners in that field would have done, he is not liable, even though others may have done differently. You see?

I just want to say one thing. You said community. It is not the neighborhood or community.

JUROR NO. 8: No, that specialist.

THE COURT: Yes. We have heard the specialist. There are orthopedic people and they are not brain surgeons, and there is this specialty, internist and the like. I won't try to define it.

If he conformed to those who generally practice in that specialty, the fact that others in the field may do differently doesn't mean that he should have, but if generally speaking what he did would have conformed to that standard that those generally in that field conformed to, he has satisfied the standard.

(2)

No. 88-135

In The

Supreme Court of the United States

October Term, 1987

JOHN DeSIMONE and HELEN DeSIMONE, his wife,

Petitioners,

vs.

RICHARD L. BOVE, M.D.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH T. BODELL, JR., ESQUIRE
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QUESTION PRESENTED

Where a new State Appellate Court Decision which neither alters nor overrules established and controlling issues of state law is handed down during the pendency of an appeal, has a Federal Court of Appeals by relying upon the very same precedents exclusively relied upon in the new State Appellate Court decision so far departed from the accepted and usual course of judicial proceedings so as to warrant an exercise of this Court's power and supervision by Writ of Certiorari?

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No. 88-135

In The

Supreme Court of the United States

October Term, 1987

JOHN DeSIMONE and HELEN DeSIMONE,
his wife,

Petitioners,

vs.

RICHARD L. BOVE, M.D.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Appendix A) is not officially reported. There was no opinion of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on March 29, 1988. A timely Petition for Rehearing was denied on April 21, 1988 (Appendix C).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners, John DeSimone, ("DeSimone"), and Helen DeSimone brought this malpractice action against Respondent, Dr. Richard L. Bove, claiming that Dr. Bove negligently performed a colonoscopy and failed to obtain DeSimone's informed consent. DeSimone alleged that Dr. Bove performed the colonoscopy in a negligent manner so as to perforate DeSimone's colon. DeSimone's theory on informed consent was that Dr. Bove failed to inform DeSimone of an alleged alternative radiological procedure and that Dr. Bove failed to inform DeSimone that perforation was a known risk of the colonoscopy procedure.

DeSimone's negligent performance claim went to the jury. The jury found that Dr. Bove was not negligent in his performance of the colonoscopy procedure.

With respect to the allegation that Dr. Bove failed to inform DeSimone that the perforation was a known risk of the colonoscopy procedure, the District Court properly directed a verdict for Dr. Bove. The Petitioner himself testified that he recalled Dr. Bove informing him that the colonoscopy procedure carried with it a risk of perforation, and that he was aware of and understood the risk at the time of the procedure. The Court of Appeals found that under these circumstances the District Court properly directed the verdict for Dr. Bove. As the Court of Appeals pointed out, the Court directed this verdict

based on its perception that a patient must understand the risk involved in a procedure, whether or not he was aware of all the medical detail that led to that risk. During the trial, Mr. DeSimone admitted that he understood the risk of perforation inherent in the procedure. Furthermore, there is no evidence to suggest that diverticulosis increases the incidence of perforation of the colon. Accordingly, no expert familiar with DeSimone's condition testified that it rendered him materially more susceptible to perforation. Thus, in light of Mr. DeSimone's admissions at trial and the expert medical testimony on point, the District Court properly directed the verdict and this decision was appropriately affirmed by the Court of Appeals.

Petitioner's alternative procedure theory of informed consent went to the jury. The jury found that in order for DeSimone to make an intelligent choice concerning the treatment he was to receive from Dr. Bove, it was not necessary for DeSimone to have been informed that a barium enema was an alternative to a full colonoscopy. It was undisputed that Dr. Bove did not inform DeSimone that a procedure known as a barium enema might be performed in lieu of a colonoscopy. However, the expert witnesses at trial completely disagreed as to whether this alleged alternative procedure, the barium enema, was a viable alternative to the colonoscopy. The jury agreed with Dr. Bove's experts which indicated that the barium enema was not at the time of the procedure a viable alternative to a full colonoscopy. Accordingly, the jury found that a reasonable person in Mr. DeSimone's position would not have considered the barium enema

alternative important in making his decision whether to undergo treatment.

Petitioner, by distorting both context and application, objects to the "specialist standard" instructions given by the District Court. However, such an instruction was correct. The law in Pennsylvania is clear that expert medical testimony is necessary to establish the existence and magnitude of the risks of a recommended medical procedure, as well as viable alternatives. *Jozsa v. Hottenstein*, 364 Pa. Super. 469, 528 A.2d 606 (1987). As the Court of Appeals pointed out in its opinion, the District Court took great care to twice remind the jury that expert witnesses had disagreed as to whether the alternative procedure, the barium enema, was a viable alternative to the colonoscopy. Specifically, the Court told the jury:

> [i]f you believe that at the time this was an alternative accepted by specialists in that field and the plaintiff should have known it in order to make an intelligent choice, the plaintiff was entitled to have that before he consented, and the consent without that would not be consent.

The Court of Appeals found that the specialist standard discussed by the District Court clearly related to the testimony required to establish the existence of an alternative treatment and not to what a reasonable patient would consider important. Accordingly, the Court of Appeals correctly found that the jury charge properly and fully conformed to the law of Pennsylvania on informed consent. (See Appendix E.)

Petitioner now contends that an informed consent case involving "the same issues" which was decided two months after the District Court's judgment, warrants a

reversal of the jury verdict on the informed consent issue. *Sagala v. Tavares*, ___ Pa. Super. ___, 533 A.2d 165 (1987).

Even a cursory reading of *Sagala* indicates that the judicial decision rendered neither altered nor overruled any earlier case law. In fact, the Court in *Sagala*, relied exclusively on the very same Superior Court decisions relied upon by the Court of Appeals in the case at bar.

REASONS FOR DENYING THE WRIT

A review on Writ of Certiorari is not a matter of right, but a matter of judicial discretion, and will be granted only when there are special and important reasons therefor. 28 U.S.C. Supreme Court Rule 17.1. The Petitioner seeks to have this Honorable Court review a decision from the United States Court of Appeals which: (1) is not in conflict with a decision of any Federal Court of Appeals, or any other State Court of last resort; (2) is not in conflict with applicable decisions of this Honorable Court; (3) does not present a question of federal law which must be settled by this Honorable Court; and (4) is entirely consistent and appropriate under the laws of the Commonwealth of Pennsylvania. See Supreme Court Rule 17.1(a), (b), and (c).

Notwithstanding the above, the Petitioner claims that the Court of Appeals has ignored the Court's decision in *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941), and thereby so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Honorable Court's power and supervision. The *Vandenbark* case was a diversity case which held

that the doctrine of Schooner Peggy[1], in effect, was incorporated in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, (1938). Specifically, *Vandenbark* stands for the principle that a Federal Court sitting in a diversity case, must apply the most recent state court decision where such decision altered or overruled earlier case law. *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941); *Linkletter v. Walker*, 381 U.S. 618, 626 (1965), FN. 10.

Petitioner, however, relies upon a Pennsylvania Superior Court decision which neither altered nor overruled earlier Pennsylvania case law but which relied exclusively upon the very same precedents relied upon by the Court of Appeals in the case at bar. In *Sagala v. Tavares*, ___ Pa. Super. ___, 533 A.2d 165 (1987), the Court expressly quoted and relied upon the following passage from *Cooper v. Roberts*, 220 Pa. Super. 260, 286 A.2d 647 (1971):

> Consent to medical treatment is valid if the physician disclosed all those facts, risks and alternatives that a reasonable man in the situation which the physician knew or should have known to be the plaintiffs, would deem significant in making a decision to undergo the recommended treatment. The physician is bound to disclose only those risks which a reasonable man would consider material to his decision whether or not to undergo treatment. *Cooper v. Roberts*, 220 Pa. Super. at 267-268, 286 A.2d at 650 (1971).

The Court of Appeals in the case at bar relied and expressly quoted the exact same passage from *Cooper*

---

[1] *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

as re-printed in *Sagala* in their decision. (See Appendix A-1 at page 5).

The Court in *Sagala*, also cited *Jozsa v. Hottenstein*, 364 Pa. Super. 469, 528 A.2d 606 (1987) with approval. In *Jozsa*, the Superior Court of Pennsylvania held that the law in Pennsylvania requires expert medical testimony to establish the existence and magnitude of the risks of recommended medical procedure, as well as the existence of alternatives. In short, under Pennsylvania law, expert testimony as to the existence of an alternative procedure must be established. Once established, the materiality of the alternative is determined under the reasonable man standard by the jury. *Jozsa v. Hottenstein*, Supra.; *Cooper*, Supra.; and *Festa v. Greenberg*, 354 Pa. Super. 346, 511 A.2d 1371 (1986).

The *Sagala* case neither alters nor overrules this established Pennsylvania law. The mere fact that the Court of Appeals cited the authorities relied upon exclusively by *Sagala* – as opposed to citing to *Sagala* itself – is not in any way a departure from the accepted and usual course of judicial proceedings, nor in any way is it such a departure so as to call for an exercise of this Honorable Court's power and supervision.

The Court of Appeals' affirmance of the District Court was entirely consistent with Pennsylvania law and in no way presents grounds for the granting of this Writ.

CONCLUSION

The United States Court of Appeals for the Third Circuit relied upon the established and the controlling Pennsylvania law on informed consent. Pennsylvania

Courts have adopted the "prudent patient" standard of informed consent under which valid informed consent is not dependent upon the standards of the medical community. However, the law in Pennsylvania is also clear that expert medical testimony is necessary to establish the existence and magnitude of the risks of a recommended medical procedure, as well as the existence and viability of alternative procedures. In reaching these very same conclusions, the Court of Appeals relied upon *Cooper v. Roberts*, 220 Pa. Super. 260, 267-268, 286 A.2d 647 (1971), and *Jozsa v. Hottenstein*, 364 Pa. Super. 469, 528 A.2d 606 (1987), the very same cases relied exclusively upon by the Superior Court decision in *Sagala*. Inasmuch as *Sagala* neither altered nor changed this well-established Pennsylvania law, the doctrine espoused in *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941) is inapplicable.

WHEREFORE, Respondent respectfully prays that a Writ of Certiorari be denied.

Respectfully submitted,

SWARTZ, CAMPBELL & DETWEILER
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APPENDIX A

Opinion, U.S. Court of Appeals for the Third Circuit, Filed MAR 29, 1988

See Petitioner's Appendix A

APPENDIX B

Judgment, U.S. Court of Appeals for the Third Circuit, Filed MAR 29, 1988

See Petitioner's Appendix B

APPENDIX C

Rehearing Denial, U.S. Court of Appeals for the Third Circuit, Filed APR 21, 1988

See Petitioner's Appendix C

APPENDIX D

Civil Judgment, U.S. District Court for the Eastern District of Pennsylvania, filed SEP 16, 1987

See Petitioner's Appendix D

APPENDIX E – Excerpts From Pages of Appellate Record

The lower court informed the jury of DeSimone's burden of establishing the existence of the alternative procedure:

> If you believe Dr. Bove, in not including in his discussion with the plaintiff the fact of the availability of a barium enema as an alternative, [was] following what the specialists skilled in his field would have done at the time . . . he cannot be liable because he wasn't required to inform the patient. [458a]
>
> It is only an intelligent choice if the alternative method has some meaning or would work or if the specialist in the community thinks it is really an alternative to what is to be done. [459a]

The court then instructed the jury with respect to informed consent by apprising them of the reasonable man test for materiality:

> [T]he physician must obtain the patient's consent that must be informed – what we mean by this is that he must inform the patient of the nature of the proposed procedures and treatment and the risks involved to the extent that a reasonable patient in the plaintiff's position would have considered certain risks important.
>
> He must also inform him of other methods of treatment that the doctor believes that the patient in his position would have considered important in making a decision. [458a].

The lower court's next instruction then consolidated these two points:

> [I]f you believe that at that time [the barium enema] was an alternative accepted by specialists in that field and the plaintiff should have known it in order

> to make an intelligent choice, the plaintiff was entitled to have that before he consented, and the consent without that would not be consent. [459a-460a]

The lower court's response to the jury's request to reinstruct:

> informed consent – means that the physician is bound to disclose to the patient all those facts which a reasonable man, in the situation in which the doctor knew or should have known to be his patient's situation, would consider it important to the patient's decision whether to undergo treatment. [488a]

The Court then reminded the jury that application of the prudent patient standard depends upon the existence of an alternative treatment which a reasonable person in DeSimone's condition would deem material:

> You, the jury, should determine whether or not a reasonable person in Mr. DeSimone's position would have considered that to be important in making his decision. It is going to depend on the extent to which you believe that alternative was necessary for an intelligent choice to be made by Mr. DeSimone.
>
> Was Mr. DeSimone fully informed of that alternative? First, you have the question of whether it was a real alternative, first. [489a-490a]

Taken in light of the expert testimony and the two-step test for materiality, the charge as a whole correctly informed the jury of the law of Pennsylvania.

No. 88-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DeSIMONE and HELEN DeSIMONE,
his wife,

Petitioners,

vs.

RICHARD L. BOVE, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JOHN DeSIMONE and HELEN DeSIMONE,
his wife,
Petitioners,

vs.

RICHARD L. BOVE, M.D.,
Respondent.

PETITIONERS' REPLY BRIEF

As petitioners were not afforded the opportunity to orally argue before the panel, which ordered the matter submitted without argument, it is undetermined just why the court of appeals breached its appellate obligation to have applied *Sagala v. Tavares,* 533 A.2d 165 (Pa. Super. 1987).

This Court has consistently held that its *Erie* decision imposes a continuing duty upon federal courts to decide questions of state law in diversity cases. *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 237 (1940). This greater responsibility and duty is not excused because of the difficulty of answering those questions or the character of those answers. *Meredith v. City of Winter Haven,* 320 U.S. 228, at 237 (1943).

The rights of parties to litigation are thus adjudicated ". . . in accordance with the applicable principles for determining state law." *Id.*, at 238. Federal courts have a duty to ". . . ascertain from all available data what the state law is and apply it . . . Where an intermediate state court rests its considered judgment on the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court . . ." *West v. American Telephone & Telegraph Co., supra*, at 237.

Moreover, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, at 543 (1941) mandates that federal courts apply state law based on the latest state court controlling *decision*. *Vandenbark* required the court of appeals to follow the written *decision* in *Sagala* — not just its precedents — because the opinion was issued subsequent to the federal trial court judgment. *Cf. Bradley v. School Board of City of Richmond*, 416 U.S. 696, 713, Fn. 17 (1974).

Huddleston v. Dwyer, 322 U.S. 232 (1944) requires vacation of the court of appeals decision here, for failing to consider *Sagala* — a decision which ". . . has at least raised such doubt as to the applicable [Pennsylvania] law as to require its re-examination in the light of that opinion . . ." *Id.*, at 236, 237.

Sagala altered and changed Pennsylvania law: *Sagala* is the *only* decision which fashions an exclusionary rule concerning evidence in an informed consent case. *Sagala* establishes the standards for admissibility of evidence in such an action, precluding the introduction of any evidence concerning professional standards, because same ". . . incorrectly invites the jury to consider whether the physician acted in conformity with the customary practices of other physicians." *Sagala*, 533 A.2d at 167. ". . . this type of testimony was improperly submitted to the jury."

Ibid. ". . . the introduction of the professional customs testimony usurps the role of the trier of fact and introduced principles that were incompatible with the reasonable patient standard adopted by this Commonwealth." *Id.* at 168. Appendix A shows two of the many examples of improperly admitted defense testimony of Drs. Resnick and Bove.

The tainted evidence thus resulted in producing two fruits of a poisoned tree: an improperly directed verdict regarding the increased risk due to diverticulosis, and the improper approval of the "specialist standard" of disclosure.[1]

Sagala applies existing Pennsylvania law to obtain a different — but consistent — legal result when compared to other Pennsylvania precedent. This, of course, is natural with the principle of *stare decisis,* wherein the common law evolves on a case by case basis. It would be abnormal for *Sagala* to have differed from prior Pennsylvania precedent, since until a ". . . decision should be over-ruled by the Superior Court itself or over-ruled by the Supreme Court, it is still the law of this Commonwealth, regardless of the decisions of any other court in the country, including the Federal courts." *Commonwealth of Pennsylvania v. Ewansik,* 520 A.2d 1189, 1190 (Pa. Super. 1987), relying on *In Re Townsend's Estate,* 36 A.2d 438, 441 (Pa., 1944).

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[1] Respondents misstate the district court record by claiming there is a lack of evidence concerning the increased risk of perforation due to diverticulosis and the alternative of a diagnostic barium enema examination. Petitioners have reproduced part of the statement of facts from their Appellants' Opening Brief in the court of appeals, which contains the appropriate references to the actual evidence in the record which supports their position. See Appendix B.

Since the federal courts here are adjudicating a matter of state law, in diversity, and are effectively only another Pennsylvania court, it would be incongrous indeed to hold the federal courts not bound by a decision which would be binding on any Pennsylvania court. *King v. Order of United Commercial Travelers*, 333 U.S. 153, at 161 (1948).

Sagala thus distinguishes — in practical application — between objective information which experts must supply, and subjective decision making based on that information, which is the sole province of the jury. Sagala requires that certain testimony must be excluded to prevent the risk that a judge — or jury — improperly relies on same. Motions for new trials and legal arguments over jury instructions are inferior substitutes for direct and focused testimony.

The court of appeals had a duty to ascertain the most current Pennsylvania law applicable to the instant case — it did not fulfill that duty. If *Sagala* is deemed to have altered or changed Pennsylvania law, *Vandenbark* required the court of appeals to follow it. If *Sagala* simply clarified Pennsylvania law, *Oklahoma Packing Co. v. Oklahoma Gas Co.*, 309 U.S. 4, 7, 8 (1940) required the court of appeals to apply it. *Huddleston* required the court of appeals to at least consider *Sagala*.

This Court established the duties for federal courts of appeal in diversity cases, and this Court itself has a duty to enforce such obligations by those appellate courts. Granting the Writ thus ensures adherence to the Rule of Law, to which all participants herein are subject.

Respectfully submitted,

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APPENDIX A

APPENDIX A

EXCERPTS FROM PAGES OF APPELLATE RECORD

Page 95a, ll. 1-7 (testimony of Dr. Resnick)

A. I wouldn't say it's not acceptable. It is not the ideal or the gold standard — the state of the art that we practice today.

Q. When you say gold standard, would you explain for the jury what that means?

A. I don't think it's the best procedure available to follow for people who have had a colon cancer.

Page 374a, ll. 2-5; ll. 17-24 (testimony of Dr. Bove)

Q. And it is correct to state, doctor, that in this case did you not order any barium enemas post-operatively?

A. It is not the standard of care to follow-up with cancer patients in 1984.

* * *

According to the societies which I am a member of and in which I am an active participant and in the way in which I teach the students at Jefferson, barium enema is not a useful study to the follow-up on cancer patients.

Q. Since you you *(sic)* do not believe it to be a useful study, there was no reason to and in fact you did not advise Mr. DeSimone of the existence of a barium enema?

A. That's exactly correct.

APPENDIX B

PORTIONS OF THE STATEMENT OF FACTS CONTAINED IN APPELLANTS' OPENING BRIEF FILED WITH THE COURT OF APPEALS

* * *

More than a year later, in October, 1985, DeSimone while suffering from diverticulosis, returned to Dr. Bove for a follow-up appointment (347a). Dr. Bove advised that a colonoscopy, an intrusive internal examination of DeSimone's remaining colon, be performed as part of the follow-up procedure (350a). DeSimone refused. (274a). Without ever informing DeSimone of the less intrusive, alternative procedure of a barium enema (276a-277a, 374a) or that the colonoscopy created an increased risk of perforation of the colon because of DeSimone's diverticulosis (219a, 390a),[2] Bove persuaded DeSimone nonetheless to allow the colonoscopy.

Thus informed, or uninformed, DeSimone consented to the colonoscopy which Dr. Bove performed on November 5, 1985 (277a). During the procedure, Dr. Bove preforated *(sic)* DeSimone's colon at the site of a diverticulum (221a-222a), the very point at which the increased risk of perforation existed.

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[2] This increased risk would not have existed with a barium enema. (226a-228a). Diverticulosis is an outpocketing of the colon wall (389a). Diverticulitis is a separate disease caused by inflamation (66a, 390a). A diverticulum or diverticula is a weakened spot in the colon which results from diverticulosis (219a).

Plaintiff's theory at trial was that DeSimone should have been informed that a barium enema was a less invasive method of examination. While there was no dispute among the medical witnesses that the barium enema was an alternative method of colon examination (74a-76a, 123a-124a, 226a-228a, 346a), there was controversy whether it was the best method available. (346a, 374a).

Plaintiff's expert Dr. Fox, testified that the barium enema would have given Dr. Bove necessary information without the risk of perforation of the colon (223a-228a). Dr. Fox opined that a barium enema was a viable alternative method of examining the colon, and that diverticulosis increased the risk of perforation with a colonoscopy (219a, 223a-224a, 226a-227a). . . .

Dr. Resnick, defendant's expert, agreed that diverticulosis increases the risk of perforation of the colon during a colonoscopy, an extremely difficult procedure under ideal conditions (43a-44a). The increased risk exists first because of a weakened spot in the colon caused by diverticulum, and second because of the location of DeSimone's diverticulosis in the sigmoid area of the colon, where the perforation here actually occurred. (68a-69a). Dr. Resnick also agreed that explaining and disclosing the increased risk of perforation to a patient suffering from diverticulosis is important. (69a). The lower court, however, precluded the jury from considering whether these risks should have been disclosed by granting a directed verdict, stating that because DeSimone knew generally of the risk of colon perforation, he did not need to know of the

increased or additional risk caused by his condition (315a-316a).

With regard to plaintiff's alternative method theory, the facts were not in dispute that a barium enema is an alternative method of examining the colon, although medical opinions differed regarding which method was the "gold standard". (95a). Defendant Bove and his expert agreed that the barium enema is "not a state of the art examination". (95a, 346a). Resnick admitted, however, that barium enemas were once useful,[3] generally of good quality, and that he would inform a patient of the possibilities of using either a barium enema or a colonoscopy. (74a-76a). Resnick further agreed with Fox that barium enemas can be of great help as a "road map". (79a-80a). Resnick stated, though, that while the barium enema is an alternative method of examining the colon, he believed it was not an "ideal or the gold standard" and that it just was not the best procedure. (94a-95a).

* * *

[3] Dr. Susan Harding, a defense medical witness stated that she preferred to have both studies done as they complement each other. (123a).